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No. 74-1594

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

DIAPULSE CORPORATION OF AMERICA,
Petitioner,

—v.—

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

THE QUESTIONS PRESENTED:

The 1974 superseding injunction did not enlarge the 1972 "injunction [merely] to bar petitioner from introducing sub-

stantially identical devices".* The 1974 judgment bars petitioner, inter alia, (as stated at pages 10-11 of the petition), from marketing also any pulsed device with all the heat capabilities of conventional medical diathermy which the F.D.A. requires, and with the standard claims with which such devices (including pulsed) are freely marketed by other manufacturers.

That restraint is embedded in Section II(E)(3) of the judgment

*That erroneous statement on page 1 of the opposition brief is repeated on page 5 of that brief. There is a failure to realize that the 1974 injunction bars defendant from marketing a pulsed diathermy device no matter how much heat it generates.

(Pet. App. 46) which prohibits defendant from marketing any pulsed device "unless (1) the peak power available at any setting of said device does not exceed the average wattage of such setting" (see tables appended to Judge Dooling's opinion at Pet. App. 99-100).

Thus, petitioner respectfully submits, "The Questions Presented" are accurately set forth at pages 3-4 of the petition.

HISTORY

The historical recital in the opposition brief overlooks the injunction which was issued within several days after the commencement of this action. That injunction, issued on May 6, 1968, on plaintiff's

motion and defendant's consent, restrained defendant only from marketing Diapulse with any of the forty-nine claims which the Connecticut jury had found were false or misleading (Pet. App. 153, 163-9). That injunction was voluntarily circularized by defendant to and among its dealers and their salesmen. Never was there a charge that the injunction had not been observed. That limited injunction remained in force for three years and seven months until December 8, 1973, when it was superseded by another "Preliminary Injunction" which totally banned, on and after December 15, 1973, the interstate marketing of defendant's athermal Diapulse (Pet.

App. 184-5). That enlargement of the May 6, 1968 preliminary injunction was stayed by the Court of Appeals. Thus the May 6, 1968 limited injunction continued in force until the decision of the Court of Appeals on March 20, 1972 (457 F.2d 25) which affirmed the December 8, 1973 injunction. The latter remained in force until the entry of the final judgment on July 18, 1972 limited to athermal Diapulses (Pet. App. 58-62).

The only charges of injunction violations were those which were alleged in the August 1, 1973 proceeding. After hearing the Government's evidence, Judge Dooling dismissed all of those charges on the ground that the complained-of acts did not violate

the injunction.

It is realized that the above details have no bearing on whether certiorari should be granted to review the important questions of judicial power and judicial administration which this case presents. But since respondent seems to impliedly suggest that certiorari should be denied because petitioner is a miscreant, the foregoing recital of the overlooked record facts is offered to demonstrate the absence of factual foundation for the animadversions.

RESPONDENT'S LEGAL ARGUMENT

(1). Respondent seems to argue that the changes effected by the

13-page 1974 rewriting of the 4-1/2 page 1972 Permanent Injunction are so minor that they do not warrant consideration of the power to broaden a final injunction. Did Judge Dooling's prodigious labor (manifested in his 37-page opinion as well as in his "Permanent Injunction"--Pet App. 44-57, 63-100) result in only insignificant or trivial changes?

The de minimis argument, insofar as it relates to the most vital and most drastic enlargement of the scope of the 1972 final injunction (Pet. 9-11) is primarily, as already noted, a misunderstanding, or failure to appreciate the effect, of the sophisticated technical prescriptions in

Section II(E)(3) (Pet. App. 46) which were not contained in the 1972 Judgment.

As to the six other complained-of additions (Pet. 11-14), the argument that they are per se "appropriate", even if it were sound, does not meet the argument of lack of power to broaden a final judgment in any respect. (At p. 7 of its brief, respondent recognizes that the 1974 judgment is a "broadened injunction"). If, as petitioner contends, there is no power to make any enlargement of a final judgment, the extent of the broadening is irrelevant.

(2). Strangely, the Solicitor General totally ignores: (a) FRCP 60(b), as amended in 1948, in the context

of Rules 50(b), 52(b), 59(a), 59(d), 59(e) and 60(a); (b) the report of the Advisory Committee that produced the 1948 amendments; and (c) Klapport v. United States, 355 U.S. 601 (1949).

Respectfully submitted,

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September 17, 1975